

(1998) 08 AHC CK 0007
In the Allahabad High Court
Case No : Criminal Revision No. 474 of 1998

Kamalesh Parihar and Another

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 04-08-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 138, 436, 437, 437(1), 438
Customs Act, 1962 — Section 104
Foreign Exchange Regulation Act, 1973 — Section 35(1)
Penal Code, 1860 (IPC) — Section 120B, 409, 420, 467, 468

Citation : (1998) 08 AHC CK 0007

Hon'ble Judges : R.K. Mahajan, J; Palok Basu, J

Bench : Division Bench

Advocate : Jagdish Singh Sengar, for the Appellant; A.G.A. and Girdhar Nath, for the Respondent

Final Decision : Dismissed

Judgement

Palok Basu and R.K. Mahajan, JJ.—The applicants, Kamlesh Parihar and Dr. J.S. Parashari, have filed this criminal revision against the order dated 31.3.1998 passed by the Sessions Judge, Pilibhit whereby he has allowed the application filed by the State of Uttar Pradesh and cancelled their bail, thus setting aside the order of the Chief Judicial Magistrate. Pilibhit dated 28.1.1997 granting bail to the applicants in Case Crime No. 381 of 1996, P.S. Kotwali, District Pilibhit under Sections 420, 467, 468, 471, 409 and 120B, I.P.C. registered against them alleging embezzlement of Rs. 1,03,18,420.85p. It has been further directed that both the applicants should be taken into custody and if both or either of the applicants is not present in Court, his sureties will produce him or them before the Chief Judicial Magistrate on 6.4.1998. By an interim order dated 7.4.1998 passed by a learned single Judge when this revision was filed, the aforesaid direction of the Sessions Judge dated 31.3.1998 was meanwhile stayed which operates till date. During the pendency of this revision, counter-affidavits for the State of U. P. as well as for the C.B.I, have been filed to which rejoinder-

affidavits have been filed by the applicants.

2. Sri J.S. Sengar, learned Counsel for the applicants has been heard at substantial length in support of this revision. He has placed entire record including the impugned order, Magistrate's order and all the averments incorporated in the respective affidavits filed by the parties. Shri Girdhar Nath, learned standing counsel for the C.B.I, has been heard in opposition. Shri Upendra Shukla, learned Additional Government Advocate has espoused the cause of the State of U.P.

3. The facts lie in a narrow compass. Admittedly, a first information report has been lodged against the applicants on 30.12.1996 by the Director, Ayurveda and Unani Department alleging therein that the two applicants entered into a criminal conspiracy with Dr. Shiv Raj Singh, the then Director of Ayurved and Unani Directorate, U.P., Lucknow and have misappropriated a sum of Rs. 1,03,18,420.85p. It is strange that though this named F.I.R. was registered, the applicants were not arrested by the local police and no proceedings against them appear to have been taken by it. It transpires that in view of subsequent developments, the C.B.I, has taken over the investigation and according to the counter-affidavit filed by the C.B.I., the charge-sheet is likely to be filed very soon. The aforesaid F.I.R. against the applicants is based upon a special audit report prepared after examining the records at the two centres run by Ayurved Directorate at district Pilibhit. The applicant No. 2 Dr. J.S. Parashari was admittedly the Principal of Rajkiya Lalit Hari Ayurvedic College Evam Chlkitsalaya and was also looking after Lalit Hari Aushadhi Nirman Shala and Kendriya Aushadhi Bhandar, Pilibhit. The applicant No. 1, Kamlesh Parihar, was a clerk in the aforesaid college. It is alleged that according to the audit report, the applicant No. 2 went on drawing far more sum of money from the Treasury than the amount allocated under the budget. It is further stated that the applicant No. 2 did not have the power to make the purchases in the manner he did and further that most of the medicines that he purchased were substandard or adulterated. It is further alleged that Purchase Committee should have been convened by the applicant No. 2 for calling tenders from approved suppliers which was never convened. The applicant No. 1 is said to have helped in actual withdrawal of the amount. The applicants caused loss to the State exchequer to the tune of rupees one crore three lacs eighteen thousand and odd in conspiracy with the then Director, Dr. Shiv Raj Singh. Therefore, the prosecution allegation is simple that the two accused respondents have colluded with the Head of the Directorate at Lucknow and caused enormous loss to the State exchequer in a clandestine manner.

4. Sri J.S. Sengar has vehemently argued and wanted this Court to go into the allegations as according to him on merits, the two accused cannot be held liable for the alleged purchases or supply of the medicines which, according to him, were directly made and ordered by the then Director and the applicants had no hand therein. Suffice it to say, according to the counter affidavit filed by the

C.B.I, and the State, these matters are under investigation. Therefore, neither this is the stage nor should this Court make any detailed examination of allegations or make comments which should put any obstacle in the investigation of the case.

5. Reliance has been placed by Sri Sengar on the celebrated decision of the Hon"ble Supreme Court in the case of State (Delhi Administration) Vs. Sanjay Gandhi, and it was contended that there was an order of bail in favour of these two applicants, therefore, it should not be cancelled normally.

6. Coming now to the merits of the revision itself, it may be noted that the Sessions Judge has cancelled the bail granted to the accused-applicants on two grounds (1) The Chief Judicial Magistrate had no jurisdiction to grant bail to the accused; (2) the accused were not in custody or jail when the bail application was moved, hence, the application was itself not entertainable. It may be mentioned that the sections which have been levelled against the applicants include Sections 467 and 409, I.P.C. which are prima" facie shown to be punishable with imprisonment for life.

7. The present revision along with the attending materials does not include the bail application and/or any surrender application which the applicants may have moved before the Magistrate. Nonetheless, some application was moved before the Chief Judicial Magistrate, Pilibhit on 27.1.1997. Neither of the accused-applicant was under arrest nor had been taken into custody on the date when the bail application was moved and yet the Magistrate proceeded to pass the following order:

It has been argued that no case is made out against the accused. The report he called for from P.S. concerned in light of the application. Summon the C.D. also for 28.1.97.

(emphasis by Court).

8. It may be noted here that all bail applications unless the offence is covered by Section 436, Code of Criminal Procedure have to be moved u/s 437 Code of Criminal Procedure. The language used in Section 437, Code of Criminal Procedure has been interpreted by Shri Sengar on behalf of the applicant to read and mean that custody of the accused is not necessary. He further argued that since the Magistrate did take these two applicants into custody on 28.1.1997 and then granted bail, therefore, on the day the bail order was passed, the accused should be deemed to be in custody.

9. In opposition, it has been pointed out with equal vehemence that provisions of anticipatory bail do not exist in the State of U.P. as Section 138, Code of Criminal Procedure has been repealed by U.P. Act No. 16 of 1976. It was further contended that unless the accused was already in custody, bail application could not have been moved. On merits, it was submitted that looking at the overall circumstances, the Magistrate had clearly outstripped his jurisdiction in granting

bail. It was pointed out that the role attributed to the applicant Kamlesh Parihar was that he used to go to Lucknow and bring the orders regarding allotment and other connected documents whereas the applicant No. 2 was himself the drawing and disbursing officer and both were prima facie guilty under Sections 409 and 467, I.P.C, both sections being punishable with imprisonment for life.

10. Having thus noted all the relevant facts and respective arguments, the order of the Sessions Judge must be upheld as it upholds the law, applies the correct procedure and rightly decries the Chief Judicial Magistrate's machination. It may be stated here that the conduct of the Chief Judicial Magistrate in passing the aforesaid order is totally without jurisdiction. Countenancing such an order is likely to send wrong signal laying down wrong and illegal proposition. If such an order is upheld, the day may not be far off when accused though wanted in grave offences punishable with imprisonment for life shall get summoned the case diary or material collected without surrendering or physically submitting to the custody of the Court and go on getting bail orders from Magistrate's Courts. This maneuvered order of the Chief Judicial Magistrate is apparently the outcome of extra legal exercise, it should not be carried any further and must be put down and buried deep using the strongest language. If Section 438, Code of Criminal Procedure has been omitted, the accused cannot have an order of anticipatory bail from the Magistrate's Court without surrendering actually. It is imperative that bail application can be entertained only when the accused is in custody of the Court or has been arrested.

11. At this stage, reference may be made to a couple of landmark decisions by the Hon"ble Supreme Court. In Kartar Singh's case 1994 (3) SCC 569 , the validity of U.P. Act No. 16 of 1976 has been upheld whereby Section 438, Code of Criminal Procedure stands repealed in Uttar Pradesh. Therefore, what cannot be done directly, can and should not be permitted to be done indirectly. On the question as to how and when an accused may make himself surrender and submit to a Court's jurisdiction for the purposes of applying for bail has been succinctly laid down in the case of Niranjana Singh and Another Vs. Prabhakar Rajaram Kharote and Others,

12. In Kartar Singh's case (supra), the Hon"ble Supreme Court has held that:

Section 438, Code of Criminal Procedure is a new provision incorporated in the present Code creating a new right. If that new right is taken away, it cannot be said that removal of Section 438, Code of Criminal Procedure is violative of Article 21....

It has further been held in Kartar Singh's case that:

The condition that "there are grounds for challenging that he is not guilty of an offence" and which condition given in different form is incorporated in other Acts, such as Clause (i) of Section 437(1) of the Code and Section 35(1) of FERA and 104 of the Customs Act cannot be said to be an unreasonable condition infringing principles of Article 21.

13. In Niranjana Singh's case (supra), it has been held that:

He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions....

14. It may be mentioned here that the aforesaid observations exist in para 9 following the observations which exist in para 7 in Niranjana Singh's case (supra)--"We agree that no person accused of an offence can move the Court for bail u/s 439, Code of Criminal Procedure unless he is in custody."

15. Reference should at this stage be made to a decision of the Apex Court in Gurcharan Singh v. State AIR 1978 SC 179. It has been held that:

If the police officer arrests a person on a reasonable suspicion of commission of an offence punishable with death or imprisonment for life and forwards him to a Magistrate, the Magistrate at that stage will have no reasons to hold that there are no reasonable grounds for believing that he has not been guilty of such an offence. At that stage unless the Magistrate is able to act under the proviso to Section 437(1), bail appears to be out of question. The only limited inquiry may then relate to the materials for the suspicion. The position will naturally change as investigation progresses and more facts and circumstances come to light. Section 439(1), on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike, u/s 437(1) there is no ban imposed u/s 439(1), against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. ...The overriding considerations in granting bail which are common both in the case of Section 437(1) and Section 439(1), are the nature and gravity of the circumstances in which the offence is committed, the position and the status of the accused with reference to the victim and the witnesses...ct.

16. It is, therefore, no more in dispute as to what is true scope of the language which has been used in Section 437, Code of Criminal Procedure when compared to Section 439 thereof. The guideline of Hon'ble Supreme Court that overriding considerations in granting bail are common in both Sections 437(1) and 439(1), Code of Criminal Procedure brings to an end the argument of the learned Counsel for the applicants that a bail application can be entertained by the Magistrate's Court even without ordering taking into custody of the accused if he has made the application for surrender. To repeat, if the power to a Magistrate to call for report of the police or materials collected during investigation thus is permitted to be exercised at that stage without arrest or surrender of accused, it is exactly permitting Section 438, Code of Criminal Procedure to be brought in vogue by a

Magistrate which is far away and beyond his competence and also an action wholly without jurisdiction. For these added reasons, the findings of the Sessions Judge that bail application was not maintainable on the date it was entertained by the Chief Judicial Magistrate has to be upheld.

17. The subsequent decisions of Hon"ble Supreme Court with regard to the grounds and contingencies as to when bail may be cancelled have all reiterated reasonings in Sanjay Gandhi's case (supra).

18. In Daulat Ram v. State of Haryana 1995 SCC 237, the Apex Court has again drawn a distinction as and when the bail may or may not be granted in non-bailable cases and when in such, a case bail may be cancelled.

19. In Mool Chand v. State 1991 SCC 1001, it has been held by Hon"ble Supreme Court that while a petitioner was in judicial custody and investigation was taken over by C.B.I., it was not necessary for the Court to express any opinion on merits or demerits of the case regarding Petitioner's involvement. If the principle laid down in this case is applied to the facts of the present case, the Sessions Judge also, much less the Magistrate should not have commented on the merits of the matter if the applicants were in judicial custody as the case has already been taken over by C.B.I. But strangely enough, the Magistrate has, in this instant case as noted above, discussed some of the alleged reasons in his order so as to assume jurisdiction to grant bail to the applicants. The Sessions Judge was, therefore, perfectly right in setting aside the said order and this has to be upheld without hesitation.

20. Before parting, it may be mentioned here that any observation existing in this judgment or in the order of the Sessions Judge or of the Magistrate concerned shall not be used for deciding the bail application of the applicants if moved after they are arrested or surrendered and go into the custody of the Court or in any subsequent proceedings which are to go on hereafter.

21. In view of what has been stated above, the other argument made in opposition that the revision is not maintainable on the ground that the order cancelling bail is an interlocutory order, is not necessary to be decided.

22. In view of what has been stated above, the revision application has no force and is dismissed. The interim order dated 7.4.1998 is set aside. Both the applicants shall surrender forthwith or shall be arrested by the investigation agency without any delay whatsoever.

23. At the end Shri Sengar wanted a certificate for leave to appeal to the Hon"ble Supreme Court. Such a request is not maintainable as in such matters certificate for leave to appeal is not necessary.